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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

Commonwealth of Massachusetts;
New England Power Company;
Dennis J. Roberts II, Attorney General of
Rhode Island; and Edward F. Burke,
Administrator of Rhode Island Division
of Public Utilities and Carriers,
Appellants,

v.

New Hampshire Legislative Utility
Consumers' Council,
Appellee.

On Appeal from the Supreme Court of
New Hampshire

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

A statute of the State of New Hampshire, RSA 374:35, provides that the New Hampshire Public Utilities Commission (PUC) may order a corporation to cease transmitting hydroelectric energy outside of New Hampshire. Invoking this statute, the PUC ordered the New England Power Company to stop transmitting hydroelectric energy from its dams in New Hampshire to customers in Massachusetts and Rhode Island. The PUC further ordered that the Company make arrangements to sell the previously exported hydroelectric power

to utility companies within New Hampshire. In the final judgment appealed from, the Supreme Court of New Hampshire affirmed the PUC's orders and remanded to the PUC for the mechanics of implementation. The intended and actual effect of the decision is to secure the economic benefits of hydroelectric energy generated in New Hampshire exclusively for its citizens at the direct expense of Massachusetts and Rhode Island and their citizens. The questions presented are:

(1) Whether Part I of the Federal Power Act, which establishes a broad regulatory scheme conditioning the construction, operation and maintenance of hydroelectric projects on navigable waters, preempts the operation of the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC.

(2) Whether Part II of the Federal Power Act, which grants the Federal Energy Regulatory Commission comprehensive and exclusive jurisdiction over wholesale electric rates in interstate commerce, preempts the operation of the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC.

(3) Whether the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC constitutes an undue burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution.

(4) Whether the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC violates the privileges and immunities of the citizens of Massachusetts in contravention of article IV, §2 of the United States Constitution.

(5) Whether, assuming that Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, Congress has violated that Clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, has violated the rights of the Commonwealth of Massachusetts and its citizens as guaranteed by the Tenth Amendment or the Privileges and Immunities Clause.

PARTIES TO THE PROCEEDING BELOW

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption. The Commonwealth of Massachusetts is a party both in a proprietary sense as a consumer of electrical energy and as parens patriae to its citizens. The state of New Hampshire, which presented argument to the court below, is not included as a party for the reason that it failed to intervene or join as a party as provided by statute.

Pursuant to S. Ct. Rules 28.4(b) and (c), the Commonwealth states that 28 U.S.C. §§2403(a) and (b) may be applicable and that service to the Solicitor General and Attorney General of New Hampshire has been made.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
1. The Facts	3
2. The Proceedings Below	5
THE QUESTIONS ARE SUBSTANTIAL	8
1. The New Hampshire Hydroelectric Export Statute, As Construed and Applied, Is Preempted By Part I of the Federal Power Act.	10
2. The New Hampshire Statute Is Preempted By Part II of the Federal Power Act.	12
3. The New Hampshire Statute Violates the Commerce Clause.	17
4. The New Hampshire Statute Violates the Privileges and Immunities Clause.	20

5. If §201(b) of the Federal Power Act Does Apply in This Case, It Is an Unconstitutional Exercise of the Commerce Power, Or Alternatively, Violates the Rights of the Commonwealth of Massachusetts and its Citizens as Guaranteed by the Tenth Amendment or the Privileges and Immunities Clause. 22

CONCLUSION 29

Appendix A

Statutory and Constitutional Provisions Not Already Presented to the Court. 1a

Appendix B

Notice of Appeal 3a

TABLE OF AUTHORITIES

Cases

Atchison R. Co. v. Public Utilities Comm'n,
346 U.S. 346 (1953) 1

Austin v. New Hampshire,
420 U.S. 656 (1975) 21

Baldwin v. Fish and Game Comm'n,
436 U.S. 371 (1978) 20, 28

Commonwealth Edison Co. v. Montana,
No. 80-581 9

Corfield v. Coryell,
6 F. Cas. 546 (No. 3,230)(CCED Pa. 1825) 21

Coyle v. Smith, 221 U.S. 559 (1911) 27, 28

Dahnke-Walker Co. v. Bondurant,
257 U.S. 282 (1921) 1

Farmington River Power Co. v.
Federal Power Comm'n,
455 F.2d 86 (2d Cir. 1972) 15

Federal Power Comm'n v. Union Electric Co.,
381 U.S. 90 (1965) 10, 11

Federal Power Comm'n v.
Southern California Edison Co.,
376 U.S. 205 (1964) 12

First Iowa Hydro-Electric Cooperative v.
Federal Power Comm'n,
328 U.S. 152 (1946) 11

Fry v. United States, 421 U.S. 542 (1975) 26

Georgia Power Co. v. Federal Power Comm'n,
152 F.2d 908 (5th Cir. 1945) 10

Goldstein v. California,
412 U.S. 546 (1973) 27

Hicklin v. Orbeck,
437 U.S. 518 (1978) 21, 28

Hughes v. Oklahoma,
441 U.S. 322 (1979) 16, 19

Lewis v. BT Investment Managers Inc.,
100 S.Ct. 2009 (1980) 16, 18

Maryland v. Louisiana,
No. 83 Orig. 9

Minnesota v. Clover Leaf Creamery Co.,
49 U.S.L.W. 4111 (January 20, 1981) 19

Missouri v. Kansas Gas Co.,
265 U.S. 298 (1924) 17, 25

Nash v. Florida Industrial Comm'n,
389 U.S. 235 (1967) 11

National League of Cities v. Usery,
426 U.S. 833 (1976) 26

Paul v. Virginia,
75 U.S. (8 Wall.) 168 (1868) 20

Pennsylvania Gas Co. v.
Public Service Comm'n,
252 U.S. 23 (1920) 15

Perez v. Campbell,
402 U.S. 637 (1971) 11

Philadelphia v. New Jersey,
437 U.S. 617 (1978) 16, 19

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 19

Prudential Ins. Co. v. Benjamin,
328 U.S. 408 (1946) 16, 24

Public Utilities Comm'n of Rhode Island v.
Attleboro Steam & Electric Company,
273 U.S. 83 (1927) 11, 12, 14, 17, 18, 25

Reeves, Inc. v. Stake,
100 S.Ct. 2271 (1980) 19,
27

Secretary of Agriculture v.
Central Roig Refining Co.,
338 U.S. 604 (1950) 25

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 25, 27

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 13

United States v. Bass,
404 U.S. 336 (1971) 23

United States v. Public Utility Comm'n,
345 U.S. 295 (1953) 12, 15

United States v. Rutherford,
442 U.S. 544 (1979) 15

United States v. Texas,
339 U.S. 707 (1950) 27

West v. Kansas Natural Gas Co.,
221 U.S. 229 (1911) 18

Constitutional and Statutory Provisions

United States Constitution
Art. I, §8, cl. 3 (Commerce Clause) passim

Art. IV, §2 (Privileges and
Immunities Clause) iii, 1, 2, 6, 8, 20, 27, 28

Art. IV, §3 28

Art. VI, cl. 2 (Supremacy Clause) 2, 7, 11

Amendment X 2, 8, 25, 26

Federal Statutes

16 U.S.C. §201(b) 13, 14n, 15, 16, 19, 22, 24, 25, 27

16 U.S.C. §803(a) 10

16 U.S.C. §824(b)(Supp. 1980) 13

28 U.S.C. §1257(2) 1

28 U.S.C. §§2403(a) and (b) iii

Public Utility Act of 1935
49 Stat. 838 (1935) 13

New Hampshire Statute

RSA 374:35 passim

Supreme Court Rules

Rules 28.4(b) and (c) iii

Miscellaneous

L. Tribe, American Constitutional
Law (1978) 23, 26, 28

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court, dated December 23, 1980, is not yet reported. It is reprinted in Appendix A to the Jurisdictional Statement of New England Power Company in No. 80-1208 [hereafter, NEPCO Juris. St.].

The New Hampshire Public Utility Commission's Reports and Orders dated August 27, 1980, and September 19, 1980, are also unreported. They are reprinted in NEPCO Juris. St., appendices B and C, respectively.

JURISDICTION

This is an appeal from a final opinion and judgment of the New Hampshire Supreme Court which rejected the arguments of the Commonwealth of Massachusetts that the New Hampshire hydroelectric export statute, as construed and applied by the PUC's orders, was preempted by Part I and Part II of the Federal Power Act and violated the Commerce Clause and Privileges and Immunities Clause of the United States Constitution. Judgment was deemed to have been entered on December 23, 1980, when the decision of the highest court of the state of New Hampshire was docketed by its clerk. This Court has jurisdiction of this appeal under 28 U.S.C. §1257(2). Cases believed to sustain jurisdiction are Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921) and Atchison R. Co. v. Public Utilities Comm'n, 346 U.S. 346 (1953).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the Federal Power Act are set forth in NEPCO Juris. St., appendix E, and therefore are not repeated here. The texts of the Commerce Clause, the Supremacy Clause, the Privileges and Immunities Clause and the Tenth Ammendment are set forth in Appendix A to this Jurisdictional Statement.

The New Hampshire hydroelectric export statute, RSA 374:35, provides in full:

> Transmitting Electricity Out of the State. Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after

notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

STATEMENT OF THE CASE

1. The Facts

The New England Power Company (NEPCO) is a public utility engaged in the generation and transmission of electricity at wholesale. NEPCO's generating facilities are powered by various energy sources, such as coal, oil and water. Six of its waterpowered facilities are located along the Connecticut River in New Hampshire and Vermont, with most of that generating capacity - 420 megawatts - located in New Hampshire. All of these hydroelectric facilities are licensed by the Federal Energy Regulatory Commission (FERC).

The power from NEPCO's hydroelectric plants flows into a "grid" which encompasses the entire six-state New England region. Ninety-eight percent of all bulk electric generating units in the region are similarly connected to the grid. Electricity flows freely through the grid irrespective of type of generating plant or of geographical boundaries. For example, a consumer of electricity in Rhode Island could not determine whether the power used at a particular moment was created in an oil-fired plant

in New Hampshire or a water-powered plant in Massachusetts. Decisions as to which power plants can be most economically used to generate electricity at any given time are made by a central computer operated by the New England Power Pool (NEPOOL), of which NEPCO and virtually all other bulk electric generating utilities in New England are members.

NEPCO's principal customers are three retail affiliates which resell electr. ity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. Seventy-five percent of this power is sold in Massachusetts. Although all electricty in the grid flows freely to the place where it is needed, the cost and benefits of NEPCO's hydroelectric units, as well as its other units, are allocated specifically to its retail affiliates' customers in the three states. The manner in which these paper allocations are made is determined both by rates and contracts approved by FERC and by a NEPOOL agreement approved by FERC.

In its order and decision, the PUC found that the effect of redirecting the benefits of NEPCO's New Hampshire hydroelectric facilities solely to New Hampshire consumers would be a savings of approximately $25 million per year. Consequently, the additional cost to Massachusetts consumers would be 75 percent of that figure, or about $18,750,000 per year. A substantial portion of that increased cost would fall on the Commonwealth itself as a consumer of electrical energy.

Moreover, the Commonwealth argued that the economic impact will be much greater than the PUC estimated due to the high cost of replacement fuel such as oil. The real effect of the PUC's order, according to the Commonwealth's experts, will be an increased cost to Massachusetts consumers of between $51.9 million and $111.5 million per year. The order will also impact adversely on consumers in Rhode Island.

2. The Proceedings Below

For the first time since the hydroelectric export statute, RSA 374:35, was enacted in 1913, the PUC on November 21, 1979 instituted an investigation pursuant to the statute to determine whether it should withdraw permission previously granted to NEPCO to export its hydroelectric energy outside of New Hampshire. In December, 1979, NEPCO moved to dismiss the proceedings on the grounds that RSA 374:35 could not constitutionally be applied by the PUC because of its undue burden on interstate commerce and that Parts I and II of the Federal Power Act preempted the statute. The PUC deferred ruling on the motion and conducted hearings on the state law questions whether hydroelectric power was reasonably required for use in New Hampshire and whether the public good required that hydroelectric power be reserved exclusively for New Hampshire consumers.

The Commonwealth of Massachusetts, on behalf of itself and its citizens, participated in those hearings. The

Commonwealth presented argument on the state law questions, maintaining that implementation of the statute would be contrary to the NEPOOL philosophy of providing efficient and reliable electric service through regional cooperation. Any breakdown in this regional approach would ultimately result in a decrease of benefits to the citizens of New Hampshire. Massachusetts also argued that a ban on hydroelectric exportation would violate the Commerce, Due Process, and Privileges and Immunities Clauses of the United States Constitution.

On August 27, 1980, the PUC denied NEPCO's motion to dismiss, and on September 19, 1980, it issued its Report and Order on the merits. Finding that the statutory prerequisites of "reasonably required for use" and required for "the public good" had been met, the PUC invoked RSA 374:35 to prohibit the export of hydroelectric energy by NEPCO and to order NEPCO to sell the energy exclusively within New Hampshire.

At the same time, it was clear that NEPCO was not to physically "snip the wires" to prevent hydroelectric energy from flowing out of New Hampshire. The physical flow of electricity into and out of the state through the NEPOOL grid was not to be impeded. Rather, NEPCO was to change its rates and contracts to bestow the economic benefit on New Hampshire without sacrificing various NEPOOL benefits such as reliable energy from oil, coal, water and nuclear powered plants in Massachusetts and other New England states.

Massachusetts unsuccessfully moved for a rehearing on the grounds that the PUC's order violated the Commerce Clause, the Supremacy Clause, the Federal Power Act, and was not authorized by RSA 374:35.

NEPCO timely appealed the PUC's order to the New Hampshire Supreme Court. Massachusetts and Rhode Island successfully joined as party appellants. The New Hampshire Legislative Utility Consumers' Council (LUCC), the adversary party before the PUC, also joined in the appeal.

After hearing, the court on December 23, 1980 rejected the applellants' federal and state law arguments and upheld RSA 374:35 as applied by the PUC. It ruled that the statute as applied was not preempted either by Part I of the Federal Power Act (because the statute did not conflict with FERC's licensing power) or by Part II of that Act (because Congress had exempted the New Hampshire statute from what otherwise would have been the preemptive effect of Part II). NEPCO Juris. St. at 4a - 8a. The court found no conflict between the statute or the PUC's order and the Commerce Clause, again relying on the view that Congress had specifically exempted statutes such as New Hampshire's from the reach of the Commerce Clause. Id. at 10a - 12a.

The court also rejected Massachusetts' arguments that, if Congress had elevated New Hampshire to a privileged position with respect to the interstate transmission of electric power, Congress had acted

contrary to the intent of the Commerce Clause and had violated the constitutional rights of the Commonwealth and its citizens under the Tenth Amendment and the Privileges and Immunities Clause. Id. at 8a - 10a. The court also upheld the PUC's order on state-law grounds. Id. at 12a - 14a.

The Court remanded the case to the PUC "for the parties to develop the mechanics of implementation." It ordered NEPCO to "make appropriate adjustments and filings with the appropriate federal and state administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power." Id. at 14a.

The Commonwealth filed a timely notice of appeal from this final judgment of the highest court of New Hampshire. (The notice is included as appendix B to this Jurisdictional Statement.)

THE QUESTIONS ARE SUBSTANTIAL

Plenary consideration of the questions raised in this case is required for the following reasons:

1. The availability and cost of energy is one of the principal issues confronting our Nation today. An attempt by one state to secure important advantages in the interstate distribution of energy therefore raises questions of national interest. The immediate and direct impact of New Hampshire's actions on millions of residents of Massachusetts and Rhode Island will be severe.

2. The decision of the court below involves important and previously undecided questions of statutory construction and application under the Federal Power Act. The questions are of great public interest and implicate the effective administration of law by the Federal Energy Regulatory Commission.

3. New Hampshire's actions violate core principles of the Commerce Clause. Left standing, they will set a dangerous precedent for the satisfaction of immediate and parochial interests at the expense of long-term interests shared by all states.

4. The case presents novel questions of constitutional law regarding the power of Congress to elevate one state to a position with regard to energy resources superior to that of neighboring states.

5. This court has already set down for plenary review the case of Commonwealth Edison Co. v. Montana, No. 80-581, prob. juris. noted, __ U.S. __, 49 U.S.L.W. 3428 (Dec. 9, 1980). Although distinguishable from this case on several grounds, the Montana case involves a similar attempt by a state to secure for itself the benefits of energy resources originating in the state but destined for interstate commerce. Further evidence of a "growing national sectionalism" on energy questions has been presented to this Court in Maryland v. Louisiana, No. 83 Orig., in the context of a first-use tax on natural gas.

(Motions for judgment on the pleadings and for dismissal were heard Jan. 19, 1981.) The Commonwealth believes that New Hampshire's attempt to assert absolute and exclusive control over native energy resources presents an even greater threat to the national economic and political fabric than the two cases now before the Court.

1. The New Hampshire Hydroelectric Export Statute, As Construed and Applied, Is Preempted by Part I of the Federal Power Act.

This Court has stated: "The central purpose of the Federal Water Power Act (now Part I of the Federal Power Act) was to provide for the comprehensive control over those uses of the nation's water resources in which the Federal Government had a legitimate interest; these uses included hydroelectric power - uses which, while unregulated, might well be contradictory rather than harmonious." Federal Power Comm'n v. Union Electric Co., 381 U.S. 90, 98 (1965) (emphasis added). Moreover, the Act "was intended to develop, conserve, and utilize the navigation and water power resources of the Country, and to that end requires that projects licensed shall 'be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce ...." Georgia Power Co. v. Federal Power Comm'n, 152 F.2d 908, 913 (5th Cir. 1945) (emphasis added), citing 16 U.S.C. §803(a); Union Electric, 381 U.S. at 100.

By enactment of this legislation, Congress left to the states "their traditional jurisdiction subject to the admittedly superior right of the federal Government, through Congress, to regulate interstate and foreign commerce ...." First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152, 171 (1946). There thus can be no doubt that Part I of the Federal Power Act was intended to and does completely occupy the field of interstate hydroelectric licensure and operation. Nor can there be any doubt that the PUC's order, as affirmed by the New Hampshire Supreme Court, has a direct bearing on the conditions under which federally licensed hydroelectric facilities operate. Union Electric, 381 U.S at 94; Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Company, 273 U.S. 83, 86 (1927). The federal licensee - NEPCO - is ordered not to engage in interstate commerce and is further ordered to confer the economic benefit of its less costly hydroelectric power exclusively on New Hampshire consumers. In view of this clear conflict, the court below erred in ruling that the New Hampshire statute, as applied by the PUC, was not preempted by Part I of the Act and thus rendered invalid under the Supremacy Clause. See, e.g., Perez v. Campbell, 402 U.S. 637, 652 (1971); Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967).

2. The New Hampshire Statute Is Preempted by Part II of the Federal Power Act.

Part II of the Federal Power Act, enacted in 1935, grants FERC comprehensive and exclusive jurisdiction over wholesale electric rates in interstate commerce. Federal Power Comm'n v. Southern California Edison Co., 376 U.S. 205, 215 (1964). Part II was enacted by Congress to "fill the gap" left by Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). As this Court has explained: "Part II is a direct result of Attleboro. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale [of electric power] in interstate commerce, while the former established federal jurisdiction over such sales." United States v. Public Utilities Comm'n, 345 U.S. 295, 311 (1953).

In view of this Court's unequivocal pronouncements on the subject, the New Hampshire Supreme Court properly recognized that regulation of interstate electric rates is within the exclusive domain of Congress and that Part II of the Act evinces a clear congressional determination to preempt the field. See id. Notwithstanding this conclusion, the court held that the PUC's order that NEPCO adjust its rates and contracts to benefit New Hampshire was not preempted and did not violate the Supremacy Clause, on the basis that Congress had exempted the New Hampshire statute from the otherwise comprehensive sweep of Part II of the Act.

The court found the congressional exemption in §201(b) of the Federal Power Act which, at the time of enactment in 1935, provided in relevant part:

> The provisions of this Part [II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line.

Public Utility Act of 1935, 49 Stat. 838, 847 (1935) (codified as amended at 16 U.S.C. §824(b) [Supp. 1980]) (emphasis added). Based on its interpretation of the legislative history of this provision, the court concluded that Congress had in 1935 "recognized as valid and lawful" the New Hampshire hydroelectric export statute, RSA 374:35, which had been enacted in 1913. This analysis is plainly incorrect.

As a threshold matter, the court should have focused on the plain language of §201(b) rather than constructing theories of legislative intent through analysis of inconclusive legislative history. See e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 & n.29 (1978).

The plain language restricts the exemption to "lawful authority now exercised" over the exportation of hydroelectric energy. In the context of this case, that phrase is sufficiently clear to obviate recourse to secondary sources of legislative intent.

In its Attleboro decision in 1927, this Court unequivocally stated that the Commerce Clause precluded states from establishing prices or rates for the interstate sale of electric power at wholesale. It was thus clear, at least after 1927, that RSA 374:35 could not constitutionally be employed to affect the prices or rates of hydroelectric power sold by wholesale exporters such as New England Power Company. No doubt mindful of this fundamental constraint, Congress in 1935 only acknowledged the states' "lawful authority" over hydroelectric exportation. Because RSA 374:35 could not lawfully have been invoked by the PUC to effect wholesale prices or rates of interstate hydroelectric energy prior to 1935, no exemption was created by Congress for the exercise of such unconstitutional authority after 1935.[1/] A congressional intention to

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1/ In addition to failing the "lawful authority" criterion, the New Hampshire statute does not satisfy the "now exercised" requirement of §201(b). It is undisputed that RSA 374:35 was not invoked to prohibit or regulate the exportation of hydroelectric power until the issuance by the PUC in 1980 of the order under review.

reverse or carve out an exception to constitutional doctrine announced by this Court only seven years earlier cannot be discerned from the language of §201(b) and should not be lightly inferred. See United States v. Public Utilities Comm'n, 345 U.S. at 302-303; United States v. Rutherford, 442 U.S. 544, 552 (1979).

This reasoning does not require the conclusion that the §201(b) exemption was meaningless when enacted. First, it can be read as an acknowledgment of the tradition of local utility regulation which grew up in an historical period prior to complex interstate energy transmission and federal involvement. See United States v. Public Utilities Comm'n, 345 U.S. at 302. It may well have been Congress' intent to reserve judgment on those marginal or grey areas such as the exportation of hydroelectric energy for retail sales, see id. at 303; Pennsylvania Gas Co. v. Public Service Comm'n, 252 U.S. 23 (1920), or the transmission of hydroelectric power from dams located on non-navigable waters, see Farmington River Power Co. v. Federal Power Comm'n, 455 F.2d 86, 89-90 (2d Cir. 1972). Second, as this Court has suggested in dicta, section 201(b) may have been intended to allow states to regulate the physical volume of hydroelectric power exported. United States v. Public Utilities Comm'n, 345 U.S. at 300-301 n.4. Whether a state could establish a sufficiently strong local interest in terminating the physical flow of power out of the state is

a question not presented by this case, which involves only paper transactions of essentially a rate-making character. See id. ("[Section 201(b)] appears not to have been drafted with state rate regulation in mind").[2/] In any event, there is no basis for concluding, as the New Hampshire Supreme Court did, that §201(b) must or should be read as a positive grant to New Hampshire of a special power exempt from otherwise exclusive federal control over wholesale prices or rates of interstate hydroelectric energy. Cf. Lewis v. BT Investment Managers, Inc. 447 U.S. _, 100 S.Ct. 2009, 2021-22 (1980) (similar savings clause of Bank Holding Company Act was not grant of power to states but merely defined preemptive effect of the Act on existing state law); Philadelphia v. New Jersey, 437 U.S. 617, 620 n.4 (1978). Compare Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (express declaration by Congress that states had power to regulate interstate insurance).

2/ If physical transmission were at issue, recent decisions of the Court, not foreseen by Congress in 1935, would appear to render invalid an attempt by New Hampshire to constrain the physical flow of hydroelectricity to within its borders. See Hughes v. Oklahoma, 441 U.S. 322, 331 (1979).

3. The New Hampshire Statute Violates The Commerce Clause.

As previously noted, this Court has squarely held that the Commerce Clause precludes states from establishing prices or rates for the interstate sale of electric power at wholesale. Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). The Court was there presented with the argument that such an activity does not implicate the Commerce Clause because price or rate regulation is necessary to protect matters of local interest and bears only indirectly on interstate commerce. This argument was rejected; instead, the Court applied the principles of Missouri v. Kansas Gas Co., 265 U.S. 298 (1924), which found the enforcement of a selling price in analogous circumstances to be a "direct burden" on interstate commerce and a transaction "not local but essentially national in character." Attleboro, 273 U.S. at 88-89. The state action therefore "must necessarily fall, regardless of its purpose." Id. at 89.

The constitutionality of New Hampshire's actions in this case must be determined under the Attleboro principles. The practical effect of the orders of both the PUC and the New Hampshire Supreme Court is to establish a discriminatory pricing or rate mechanism which bestows the economic benefits of hyrdoelectric power exclusively on New Hampshire with a necessary and concomitant increase in the cost of electric power to consumers in Massachusetts and Rhode Island.

This effect follows from the express intent of the New Hampshire statute to serve "the public good" of the people of that state by interfering with the interstate transport of hydroelectric energy. RSA 374:35.

The court below makes a distinction between "a control of rates" and "a control of the assignment of (hydroelectric) power." NEPCO Juris. St. at 11a-12a. It maintains that the PUC's order constitutes the latter rather than the former. However, as this Court has recently noted, "the principal focus of inquiry (in a Commerce Clause challenge) must be the practical operation of the statute ...." Lewis v. B T Investment Managers, Inc., 447 U.S. at _, 100 S. Ct. at 2016. Whatever the label, the practical operation of the New Hampshire hydroelectric export statute is rate or pricing regulation forbidden under the Attleboro doctrine.

Even were the PUC's order, as affirmed by the court below, deemed to involve resource allocation rather than ratemaking, it must still be held invalid under the Commerce Clause. Modern Commerce Clause doctrine with regard to a state's efforts to restrict exportation of natural resources may be traced to West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). In what this Court recently characterized as "a powerful reaffirmation of the vision of the Framers," the West case "condemned the obvious protectionist motive" of an Oklahoma statute designed to prohibit the exportation of natural gas.

Hughes v. Oklahoma, 441 U.S. at 329. Recognizing that avoidance of "economic Balkanization" lay at the core of the Commerce Clause, this Court firmly rejected Oklahoma's attempt to "conserve" its natural resources - in that case, minnows - at the expense of the other states. Id. at 325-326. Accord, Philadelphia v. New Jersey, 437 U.S. at 624. Compare, Reeves, Inc. v. Stake, __ U.S. __, 100 S. Ct. 2271 (1980)(state as market participant rather than market regulator).

Viewed either as rate regulation or resource conservation, New Hampshire's protectionist actions constitute a direct and burdensome imposition on interstate commerce which cannot be tolerated if the vision of the Framers is to be honored. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Minnesota v. Clover Leaf Creamery Co., __ U.S. __, 49 U.S.L.W. 4111, 4115 (January 20, 1981). Indeed, this Court has noted that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia v. New Jersey, 437 U.S. at 624; see id. at 627, 628.

Confronted with this barrier, the court below again turned to §201(b) of the Federal Power Act to provide an exemption for New Hampshire. For the same reasons outlined in the previous section, that provision cannot be read to carve out a special place for New Hampshire in the constitutional scheme. Judged, as it must, under the same constitutional principles applicable to the other

states, the New Hampshire statute clearly implicates the Commerce Clause and equally clearly fails to satisfy the standards of that clause.

4. The New Hampshire Statute Violates the Privileges and Immunities Clause.

Article IV, §2 of the United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In essence, the objective of that clause is to "constitute the citizens of the United States one people." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868). In furtherance of this objective, the Privileges and Immunities Clause "relieves [state citizens] from the disability of alienage in other States" and "it inhibits discriminatory legislation against them by other States." Id.

New Hampshire's application of RSA 374:35 directly implicates the fundamental concerns of the Privileges and Immunities Clause. See Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978). Hydroelectric power is produced and transmitted by a private company in New Hampshire through an interstate transmission grid to consumers in Massachusetts. This is the modern day equivalent of consumers of one state travelling to another state, either personally or through middlemen, to purchase coal for use in running their industry and warming their homes. New Hampshire has imposed the most onerous and sweeping burden on this essential

activity - it purports to prohibit it with respect to hydroelectric power. At the least, the effect of New Hampshire's actions is to impose a tax through the imposition of a higher rate for electricity in Massachusetts. Thus, New Hampshire directly exacts money from Massachusetts consumers and deposits it in the pockets of New Hampshire consumers. It is just this type of imposition on citizens of another state for the benefit of the acting state that this Court has found to be fundamentally at odds with the purpose of forming a more perfect Union. See Austin v. New Hampshire, 420 U.S. 656, 661 (1975), quoting Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3,230) (CCED Pa. 1825). If discriminatory hiring practices on oil and gas projects implicate an area "of profound national importance," Hicklin v. Orbeck, 437 U.S. 518, 533-34 (1978), then an attempt to directly embargo the use or benefits of hydroelectric power surely must also implicate fundamental concerns under the Privileges and Immunities Clause.

In addition, New Hampshire's actions invite the sort of retaliation by Massachusetts and other states in the New England Power Pool (NEPOOL) that is antithetical to "the structural balance essential to the concept of federalism." Austin v. New Hampshire, 420 U.S. at 662. "Since nonresidents are not represented in the taxing state's legislative halls, [citation omitted], judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they

could secure through their own state." Id. Such reactions are especially to be discouraged in this context where an entire region of the country would suffer from a breakdown of the mutually beneficial NEPOOL arrangement.

5. If §201(b) of the Federal Power Act Does Apply in This Case, It Is an Unconstitutional Exercise of the Commerce Power, or, Alternatively, it Violates the Tenth Amendment or The Privileges and Immunities Clause.

Serious constitutional questions are raised if the Supreme Court of New Hampshire is correct in its conclusion that §201(b) of the Federal Power Act is a license for New Hampshire to carry on otherwise unconstitutional activity. Assuming, for sake of argument, that that conclusion is correct, the following situation is created: (1) New Hampshire, and perhaps one other state in the Union,[3/] may embargo hydroelectric power destined for private interstate shipment at wholesale. (2) Massachusetts or other affected states may

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3/ To the best of the Commonwealth's knowledge, only New Hampshire and Wisconsin arguably could avail themselves of a purported exemption arising from §201(b). See NEPCO Juris. St. at 10 n.3.

not "retaliate," even if they wished to do so, because they do not have the benefit of a special exemption from the prohibitions of the Commerce Clause. (3) Thus, New Hampshire may retain the substantial benefits of regional power pooling, not the least of which is essential coal, oil, hydroelectric and nuclear power from Massachusetts, even while reserving the benefits of locally produced hydroelectric power for its exclusive use.

Framed in these terms, the question presented is whether the states, in consenting to the federal compact, could have intended that Congress could enact laws under the Commerce Clause for the purpose and with the effect of producing such an onerous discrimination among states. More particularly, this case poses the question whether the Commerce Clause was intended to afford New Hampshire the privilege of restricting or essentially taxing the export of electrical power - a commodity vital in this age to the health and security of the citizens of all the states. This Court should be singularly reluctant to interpret the Commerce Clause, or any other federal constitutional provision or law, as working such a radical and patently unintended alteration of the federal-state and inter-state balance. Cf. United States v. Bass, 404 U.S. 336, 349 (1971); L. Tribe, American Constitutional Law, §5-8 at 243; id., §6-31 at 404 ("insofar as federalism-based limits on state action also affirm underlying personal rights against government generally,

Congress should be no more able to authorize state invasion of such rights than either Congress or the state are able independently to invade them").

The decision of this Court in Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), is not to the contrary. Benjamin held that in enacting the McCarran Act, Congress validly preserved to the states the right to regulate or tax the insurance business even though such activites would otherwise have violated the Commerce Clause. However, the McCarran Act applied equally to all states; it made no distinctions among the states and established no preferences. Any state could impose a tax on, or otherwise regulate, out-of-state insurance companies. The effect of the congressional action could thus be said to have been to define a type of activity - the insurance business - that was to be deemed to be sufficiently outside the concern of the Commerce Clause to justify permitting the several states to regulate the industry. In sharp contrast, §201(b) would not declare the interstate transmission of electrical energy to be outside of that constitutional ambit. Instead, it would grant a valuable and special privilege to a handful of states, a privilege which was not available to the remaining states and which acted to place those states in a decidedly inferior position.

Nor do the cases of Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616 (1950) or South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966), cited by the Supreme Court of New Hampshire, lend support to the position that this Court has condoned seriously prejudicial and uneven treatment by Congress of the States under the Commerce Clause. Both cases dealt with national congressional policies that, when put into effect, had disparate impacts on the several states. In neither case did Congress single out one or a few states for beneficial treatment at the direct expense of the other states. In contrast, this Court has consistently held that a core purpose of the Commerce Clause is to encourage national uniformity in commercial transactions and to "preserve equality of opportunity and treatment among the various communities and States concerned." Attleboro, 272 U.S. at 82, quoting Missouri v. Kansas Gas Co., 265 U.S. 298, 310 (1924).

Even if the Commerce Clause does not itself prohibit Congress from providing special privileges to one or a few states, constraints "external" to that clause require that §201(b) not be construed to create such a result. One external source is the Tenth Amendment.

That the Tenth Amendment may, in appropriate circumstances, act directly to restrict congressional power under the Commerce Clause can no longer be doubted. National League of Cities v. Usery, 426 U.S. 833 (1976). This is but one application of the more general principle that "[l]egislation, even if authorized by the commerce clause, must be consistent with the Bill of Rights and other external restrictions of congressional power, restrictions which operate to protect not only individual interests but state interests as well." L. Tribe, supra, §5-8 at 242-243.

The essence of the Tenth Amendment is that Congress "may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). Put in a slightly different form, Congress may not treat the states in a manner which would be "contrary to the structural assumptions of the Constitution as a whole." L. Tribe, supra, §5-20 at 301. If one, or even a handful, of states are elevated to a position from which, under the cloak of congressional protection, they may gain advantages over neighboring states in areas of crucial concern such as energy, then a basic "structural assumption" of the Constitution has been violated.

An essential "residuum of sovereignty" retained by the states when the Union was formed and reserved to them through the Tenth Amendment is equality among them in "power, dignity, and authority." Coyle v. Smith, 221 U.S. 559, 567 (1911). Accord, United States v. Texas, 339 U.S. 707, 720 (1950). Although the doctrine of "equal footing" enunciated in Coyle and other cases is grounded in the context of admissions of states into the Union, see Katzenbach, 383 U.S. at 328-29, the principle of "equal sovereignty" is similarly integral to the continuing functions of states in the federal system. Cf. Coyle, 221 U.S. at 573; Goldstein v. California, 412 U.S. 546, 559 (1973) (possible prejudicial conflict if each state exercised sovereign power to impose imports and tariffs and need for national uniformity in interstate commerce); Reeves v. Stake, __ U.S. at __, 100 S. Ct. at 2278 n.10 ("Even where 'integral operations' are not implicated, states may fairly claim some measure of sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal").

A second "external" constraint on congressional exercise of the Commerce Clause power may be found in the Privileges and Immunities Clause of article IV, §2. For the reasons outlined in the previous section of this statement, the operation of RSA 374:35, as assumedly condoned by §201(b) of the Federal Power Act, violates the privileges and immunities of the citizens of the

Commonwealth. Although the court below held that the Privileges and Immunities Clause does not act as a restraint on Congress, there is contrary authority, see L. Tribe, supra, §6-31 at 403 n.18, and this Court apparently has not squarely ruled on the question. It may also be noted that the Privileges and Immunities Clause appears in the "State's Relations Article" which also includes the provision for the admission of new states, U.S. Const. art. IV, §3. It was this provision which was the basis for the "equal footing" constraints upon Congress enunciated in Coyle v. Smith, discussed above. In addition, it is not without significance that the mutual precursor to both the Commerce Clause and the Privileges and Immunities Clause, the fourth article of the Articles of Confederation, closely intertwined the concepts of privileges and immunities, equal treatment or equal footing of states, and national uniformity and equality in interstate commerce. See Hicklin v. Orbeck, 437 U.S. at 523; Baldwin v. Fish and Game Comm'n, 435 U.S. at 379 n.17.

CONCLUSION

For each of the reasons set forth above, the Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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Dated: February, 1981

APPENDIX

APPENDIX A

THE COMMERCE CLAUSE

United States Constitution, Art. I, §8, cl. 3.

The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . . . . .

* * *

THE PRIVILEGES and IMMUNITIES CLAUSE

United States Constitution,

Art. IV, §2, cl. 1

The citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.

THE SUPREMACY CLAUSE

United States Consitution

Art. VI, par. 2

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

THE TENTH AMENDMENT

United States Constitution,

Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX B

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
APPEAL OF NEW ENGLAND POWER COMPANY
NO. 80-396

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Commonwealth of Massachusetts, a party appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the New Hampshire Supreme Court entered in this action on December 23, 1980, upholding NH RSA 374:35 and Order No. 14,492 of the New Hampshire Public Utilities Commission.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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Dated: January 8, 1981
[Filed: January 15, 1981]